85-699 (1)

Supreme Court, U.S.
FILED
OCT 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

ROCCO RICHARD DESANTIS,
Petitioner,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD L. MASRY
15495 Ventura Blvd.
Sherman Oaks, Ca. 91403
(213) 872-2150
Attorney for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

QUESTION PRESENTED

Does promise to put "cap" on sentence of criminal defendant constitute promise of leniency rendering subsequent confession involuntary in violation of Fifth Amendment?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Petitioner is a criminal defendant. Co-Defendants at the U.S. District Court level were Robert Pablo Salas and Jan Alan Brion; the responsive brief of the United States at the Ninth Circuit level consolidated the appeals of petitioner and Robert Pablo Salas. There are no parties to this petition for writ of certiorari other than Rocco Richard DeSantis and the United States of America.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of Case	2
Reasons for Granting the Petition	5
Conclusion	8

Appendix A. Memorandum.

Appendix B. Order.

TABLE OF AUTHORITIES

Cases

	Page
Brady v. United States, 397 U.S. 742	5
Bram v. United States, 168 U.S. 532	5
Brewster v. State, 386 So. 2d 322	6
Grades v. Boles, 398 F.2d 409	5
Johnson v. State, 230 S.E.2d 849	6
Keller v. State, 236 A.2d 313	6
Lynumn v. Illinois, 372 U.S. 528	6
People v. Johnson, 74 Cal. Rptr. 889, 450 P.2d 265	5
U.S. v. Curtis, 562 F.2d 1153	5
U.S. v. Glasgow, 451 F.2d 557	5
U.S. v. McDaniel, 428 F.Supp. 1226	2
Walker v. State, 233 N.E.2d 483	6

Constitution, Statutes, and Regulation:

United States Constitution:
Fifth Amendment ..... i, 2, 5, 8

21 U.S.C. Section 841(a)(1) 2

21 U.S.C. Section 846 2

28 U.S.C. Section 1254(1) 1

Rules

Federal Rules of Criminal Procedure, Rule 11(e)(6) 4

Federal Rules of Evidence, Rule 410 4

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

ROCCO RICHARD DESANTIS,
Petitioner,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals (App-A1 through App-A6, inclusive, infra) is not reported. There was no opinion of the U.S. District Court.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals denying petitioner relief (App-A1 through App-A6, inclusive) was filed on May 29, 1985. A petition for re-hearing was denied on August 22, 1985 (App.B) The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person . . . shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law, . . ."

STATEMENT OF CASE

Petitioner was arrested by agents of the F.B.I. on April 12, 1984, and charged with violations of 21 U.S.C. Sections 841(a)(1) and 846, possession of heroin with intent to distribute and conspiracy to possess heroin with intent to distribute. The amount of heroin involved was approximately four ounces. Subject matter jurisdiction was vested in the U.S. District Court upon the filing of the indictment against Defendant on April 19, 1984. *U.S. v. McDaniel* (1977) 428 F. Supp. 1226.

Immediately following his arrest, agents of the F.B.I. took petitioner to the Federal Building in Los Angeles and attempted to question petitioner, who invoked his right to remain silent. Following said invocation, there was some discussion regarding petitioner's possible cooperation with the government; petitioner was then booked and subsequently released on bail. Following his release, petitioner, pursuant to agreement, contacted the lead F.B.I. agent in the case to further discuss his possible cooperation with the government in turn for possible favorable treatment by the government. A meeting was scheduled and held at petitioner's place of business on April 17, 1984, five days after petitioner's arrest. At the commencement of said meeting, petitioner executed a written Miranda waiver, then indicated that he was ame-

nable to cooperating with the government in its attempt to make a case against an individual not charged in that case but acquainted with petitioner. Petitioner expressed concern for the health of his severely ill mother and stated that he did not want to go to jail. Special Agent Hamer of the F.B.I. told petitioner that he was not in a position to negotiate a plea arrangement but that he would relay petitioner's desires to the prosecutors and would see if any agreements could be reached.

However, special agent Hamer then told petitioner that in all likelihood the government would require a guilty plea to the conspiracy charge and that if petitioner cooperated in the prosecution of the other individual, the government would put a "cap" on the maximum sentence petitioner would face. Special agent Hamer then elicited incriminating statements from petitioner regarding the events which led to petitioner's arrest.

When petitioner contacted special agent Hamer several days later, he was told that "all deals are off." The incriminating statements made at the April 17 meeting, which constituted virtually all of the evidence against petitioner, were then admitted into evidence over strenuous objection and petitioner was convicted and sentenced to 10 years' imprisonment. The government never attempted to admit statements made by petitioner on April 12.

On appeal to the Ninth Circuit, petitioner argued that the clear violation of Miranda on April 12 (continuation of interrogation despite unequivocal invocation of right to remain silent) had fatally tainted all subsequent statements of petitioner, including those made on April 17; that petitioner's "confession" of April 17 was made involuntarily since it was made pursuant to promises of leniency by the government; and that all statements made on April 17 were plea negotiations and thus inadmissible

under Federal Rules of Evidence, Rule 410, and Federal Rules of Criminal Procedure, Rule 11(e)(6).

In the government's reply brief it was contended, in relevant part, that petitioner's statements of April 17 were voluntarily made, and references were made to the facts that petitioner had executed a written Miranda waiver prior to making the incriminating statements and that petitioner was a mature adult with an above average knowledge of the legal system. The government's position was that all that had ever been promised petitioner was that if he cooperated, the prosecutors would be made aware of his cooperation. The government did not respond to petitioner's contention that he was promised a cap on his sentence if he cooperated. Nevertheless, exhibit "C" attached to the government's opposition to petitioner's motion to suppress at the trial level contained a written statement prepared by an employee of the F.B.I. which confirmed petitioner's contention that such a promise had in fact been made.

In his reply brief, petitioner reiterated specifically the contention that the April 17 promise to put a cap on his sentence rendered his subsequent confession involuntary and thus inadmissible.

In denying petitioner's appeal, the Ninth Circuit found that the meetings of April 12 and April 17 were two separate and distinct meetings, and therefore did not reach the issue of the alleged Miranda violation of April 12. The Court also found that the statements of April 17 were not made pursuant to plea negotiations. The Ninth Circuit Court of Appeals never specifically addressed the argument that the promise to put a cap on petitioner's sentence rendered his subsequent confession involuntary, apparently finding the confession voluntary for the sole reason that petitioner had executed a written Miranda waiver prior to making the statements.

REASONS FOR GRANTING THE PETITION

The early case of *Bram v. United States,* 168 U.S. 532 (1897) stands for the fundamental principles that a confession which is not voluntary is not admissible in evidence under the Fifth Amendment to the U.S. Constitution; and a confession which is the result of inducement or compulsion is not a voluntary confession.

The 1970 case of *Brady v. United States,* 397 U.S. 742, reaffirmed the holdings of *Bram,* quoting from that opinion:

> "To be admissible, a confession must be 'free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, . . . ' " *Id.* at 753.

At page 754 of the *Brady* opinion, Justice White wrote:

> ". . . [E]ven a mild promise of leniency was deemed sufficient to bar the confession . . ."

Thus the general rule seems to be that a promise of leniency will render a subsequent confession involuntary and thus inadmissible. But how is the term "promise of leniency" defined?

The Ninth Circuit has held that a simple promise by an interrogator to inform the prosecutors of the fact of defendant's cooperation is not a promise of leniency for purposes of rendering a subsequent confession invalid. *U.S. v. Glasgow,* 451 F.2d 557, 558 (1971); *U.S. v. Curtis,* 562 F.2d 1153, 1154 (1977).

It has been held that a promise to reduce or dismiss the charges does constitute a promise of leniency voiding the confession, *Grades v. Boles,* 398 F.2d 409 (4th Cir.1968), as has a promise not to seek a first degree murder charge, *People v. Johnson,* 74 Cal.Rptr. 889, 450 P.2d 265 (Cal. 1969); a promise to put a "cap" on the statutory maxi-

mum sentence, *Johnson v. State,* 230 S.E.2d 849 (Ga.1976); a promise not to prosecute, *Walker v. State,* 233 N.E.2d 483 (Ind.1968); *Keller v. State,* 236 A.2d 313 (Md.App.1967); and a mere statement that the interrogators had the power to effect leniency along with a statement that defendant could go to the electric chair, *Brewster v. State,* 386 So.2d 322 (Fla.1980).

In *Lynumn v. Illinois,* 372 U.S. 528 (1963), the United States Supreme Court held that threats to a defendant that she would receive a long jail sentence and lose custody of her children but that she would receive lenient treatment if she confessed rendered the subsequent confession involuntary and invalid.

In the present case, it is undisputed that the FBI offered petitioner substantially more than a promise to inform the prosecutors that he had cooperated. Petitioner *was* first told that Special Agent Hamer had no authority to offer a deal, but immediately following that statement Special Agent Hamer told petitioner that "in all likelihood the government would require a guilty plea to the charge of conspiracy to distribute heroin (and the government would dismiss the charge of possession of heroin with intent to distribute) and if [petitioner] would assist in some way toward the prosecution of Praigg or others, would put a 'cap' on the maximum sentence he would face." Did this statement constitute a promise of leniency?

Petitioner submits that the instant case should be reviewed at this time because, while there appear to be no direct conflicts among the circuits as to what constitutes a promise of leniency, there also appear to be no particular guidelines set out in Supreme Court opinions specifically relating to what constitutes a promise of leniency rendering a subsequent criminal confession involuntary.

While plea bargaining and the concept of cooperation by a defendant in turn for leniency by the prosecutors is by no means a new concept, it is generally clear that the practice has proliferated in the latter part of this century, particularly in light of the fact that criminal prosecutions and prison populations are at an all-time high. More recently, many criminal practitioners have become aware of the practice of "straddling the line" and getting more into the gray areas of the law on this issue, a practice of prosecutors and defense attorneys equally.

For example, in the instant case, the Government's contentions regarding specifically what this petitioner was offered for his cooperation are almost a word-for-word statement of the rule that a promise to inform prosecutors of a defendant's cooperation does not constitute a promise of leniency. Those contentions are contradicted by their own documents.

Petitioner submits that an opinion clarifying the factors attendant to whether an interrogator's statement constitutes a promise of leniency would greatly aid Law Enforcement officers in their interrogation of criminal defendants, and prosecutors in plea negotiations, as well as defense attorneys in assessing the viability of motions to suppress confessions and appeals of such denied motions. How specific must the "promise" be? Must the defendant expressly and verbally assent to the deal? How do other factors apply? For example, in this case, petitioner had never before been arrested. At the time of his interrogation he had no attorney. His mother, dependent on him for support, was severely ill and had lost her husband and only other son within one year past, all known to the FBI and Special Agent Hamer specifically. Petitioner was extremely concerned about his mother's health and the effect of his arrest and possible imprisonment thereon, also known by Agent Hamer.

This court should grant certiorari because the Ninth Circuit Court of Appeals in this case has far departed from the accepted and usual course of judicial proceedings. The Ninth Circuit has not only sanctioned such a departure by the lower court, but it has departed from its own holdings on this specific issue. As stated earlier, petitioner feels that there is some evidence from the substance of the opinion of the Ninth Circuit denying petitioner's appeal that the Ninth Circuit overlooked this specific issue in rendering its decision.

The right to be free from compelled self-incrimination is, needless to say, one of the most fundamental foundations of any democratic society. Should this petition be denied, petitioner submits that this fundamental right will be eroded. Petitioner submits that a holding that a promise to drop all but one criminal charge and to put a cap on the sentence on that charge does not constitute a promise of leniency is a holding that defies logic and common sense, as well as the 5th Amendment to the United States Constitution.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD L. MASRY
Attorney for Petitioner

October 21, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 29, 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

No. 84-5269

DC No. CR 84-392-LEW

MEMORANDUM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
VS.
ROCCO DESANTIS,
Defendant-Appellant.

Appeal from the United States District Court for the Central District of California Laughlin E. Waters, District Judge, Presiding

Argued and Submitted April 2, 1985 — Pasadena, California

Before: GOODWIN, SNEED, and SKOPIL, Circuit Judges

Appellant Rocco Richard DeSantis appeals his convictions under 21 U.S.C. §§ 841(a)(1), 846 for conspiracy to distribute heroin, and under 18 U.S.C. § 2 for possession

---

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

of heroin with intent to distribute. DeSantis contends the district court's admission into evidence of certain co-conspirator statements was error because the statements were hearsay. DeSantis also claims the court erred in admitting DeSantis' own statements, made to an agent of the Federal Bureau of Investigation ("FBI") during an interview five days after DeSantis' arrest.

DeSantis maintains his statements were inadmissible because the interview was tainted by a prior violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and on the separate ground that the statements were made during plea negotiations.

1. Admission of Co-conspirators' Statements.

DeSantis contends the district court erred in admitting into evidence the following statements of co-conspirators Brion and Salas:

(1) Special Agent Hamer than asked if "that guy in the lobby, he's the guy whose [sic] got it?" Salas replied, "yeah."

(2) Special Agent Hamer acted "suspicious" and questioned Salas, "are they with you?" Salas said "yes."

(3) Brion was heard to say to DeSantis, "it was tough."

DeSantis also appeals the admission into evidence of the statement "watch out." It is not known whether Salas or DeSantis made this statement.

DeSantis challenges the admission of the four statements on the ground that the statements did not further the conspiracy. *See United States v. Fleishman*, 684 F.2d 1329, 1337 (9th Cir.) (to be admissible into evidence under Fed.R.Evid. 801(d)(2)(E), a co-conspirator's out of court statement must be made during the course and in furtherance of the conspiracy), *cert. denied*, 459 U.S. 1044

(1982). We must decide whether the statements were in furtherance of the common objectives of the conspiracy, as opposed to mere conversation between conspirators or narrative declarations. *United States v. Bibbero,* 749 F.2d 581, 583-84 (9th Cir. 1984); *United States v. Eubanks,* 591 F.2d 513, 520 (9th Cir. 1979).

Salas' two statements are admissible. They advanced the conspiracy by reassuring Agent Hamer that the deal was proceeding. *See United States v. Mason,* 658 F.2d 1263, 1270 (9th Cir. 1981) (statements of reassurnace are in furtherance of the conspiracy); *United States v. Sandoval-Villalvazo,* 620 F.2d 744, 747 (9th Cir. 1980) (statements designed to keep potential narcotics buyers from leaving the scene are in furtherance of the conspiracy).

Brion's statement, "it was tough," falls into the idle conversation/narrative declaration category, as does the unattributed statement, "watch out." These two statements, however, are not hearsay since they were not introduced to prove the truth of the matter asserted. Moreover, any error in their admission is harmless error. *See United States v. Castillo,* 615 F.2d 878, 883 (9th Cir. 1980) ("harmless beyond a reasonable doubt" standard applies where hearsay admission arguably violates the confrontation clause; otherwise "more probably than not harmless" standard applies). The district court properly admitted the four co-conspirators' statements.

2. *Miranda* Violation.

DeSantis' second contention is that the April 17 interview with Agent Hamer was conducted in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), and that the district court erred in declining to suppress his statements.

DeSantis' theory begins with the initial questioning upon arrest. He contends the questioning was conducted

in violation of *Miranda* because of Agent Lumpkin's attempts to elicit DeSantis' cooperation after he had invoked his *Miranda* rights. DeSantis reasons that any initial *Miranda* violation tainted the interview conducted five days later because it continued the discussion commenced during the first.

A confession obtained in violation of *Miranda* does not necessarily render inadmissible a subsequent confession obtained as a result of the first. *Oregon v. Elstad,* 105 S.Ct. 1285, 1293 (1985). Where the initial *Miranda* violation has not infringed on the defendant's fifth amendment rights, a second confession obtained after adequate warnings is admissible. *Id.*

Assuming DeSantis' initial statements were obtained in violation of the fifth amendment, we must consider the tainting effect on the second interview. To assess the tainting effect of the initial admissions we consider the following factors: (1) the time that passes between confessions, (2) a change in the identity of the interrogators, and (3) a change in the place of interrogation. *Id.* at 1294.

The second interview took place five days after the first, at a different location, and was conducted by a different FBI agent. In addition, the second interview was non-custodial and took place in a non-coercive setting, DeSantis' office. DeSantis' free will is further evidenced by his active role in setting up the second interview.

Under the totality of the circumstances any primary taint was sufficiently attenuated. DeSantis' subsequent waiver was voluntary. The district court properly declined to suppress DeSantis' statements on *Miranda* grounds. Because we find the second interview was independent and voluntary, we need not reach the question of whether the initial questioning was conducted in violation of the fifth amendment.

3. Plea Negotiations.

DeSantis' final contention is that his April 17 statements were inadmissible because they were made during plea negotiations. We use a two-tiered test to determine whether an admission by a defendant is made in the course of plea negotiations. The defendant must exhibit an actual subjective expectation to negotiate a plea at the time of the discussion, and given the totality of the circumstances such expectation must be reasonable. *Castillo,* 615 F.2d at 885; *United States v. Pantohan,* 602 F.2d 855, 857 (9th Cir. 1979). DeSantis can meet neither tier of test. He was repeatedly informed that the interviewing agents had no authority to reduce the charges. Moreover, DeSantis never offered to plead guilty, or even discussed a possible plea. *See United States v. Doe,* 655 F.2d 920, 925 (9th Cir. 1980) (no plea bargaining occurred where defendant cooperated with the Drug Enforcement Administration in exchange for a recommendation for a reduced sentence). The district court did not err in refusing to suppress DeSantis' statements.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUGUST 22, 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

No. 84-5269
DC No. CR 84-392-LEW
ORDER

UNITED STATES OF AMERICA,
Appellee,
v.
ROCCO DESANTIS,
Appellant.

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Before: GOODWIN, SNEED, and SKOPIL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.